POLICY BRIEF

Legal analysis: Constitutional Implications of Washington Supreme Court's Remedy in *McCleary v. State*

by Judge Phil Talmadge
Talmadge/Fitzpatrick PLLC

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Introduction

Washington Policy Center recently asked Judge Phil Talmadge to review the state supreme court's January 2012 decision in *McCleary v. State of Washington*. Judge Talmadge served as a supreme court justice from 1995 to 2001 and was a state senator representing West Seattle from 1979 to 1995.

In this analysis Judge Talmadge looks at the court's role in interpreting our constitution in the area of funding public education and in finding the legislature had failed to fulfill its constitutional duty. He notes that while the court certainly has the authority to compel compliance with its decisions, no one wants the case to provoke a crisis between the judicial and legislative branches of our state government. His legal analysis follows.

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FROM: Phil Talmadge

RE: Constitutional Implications of Washington Supreme Court's Remedy in *McCleary v. State*

I was asked to provide my opinion regarding the constitutional implications of the Washington Supreme Court's decision in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) with respect to the remedy for the Court's determination that the State has not met its constitutional obligation under article IX, § 1 of the Washington Constitution to adequately fund K-12 education.[1] A bit of historical background is necessary to put my opinion in context.

History to School Funding Litigation

McCleary is not the first time that the Washington Supreme Court has addressed school funding under the Washington Constitution.

As early as *Northshore School District No. 417 v. Kinnear,* 84 Wn.2d 685, 530 P.2d 178 (1974), parties have argued that the State failed to meet its constitutional obligation to fund K-12 education by relying excessively on local levies. In *Northshore*, the Court rejected the challenge. Only 4 years later in *Seattle School District No. 1 of King County v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), a 6-3 opinion, the Court overruled *Northshore* and concluded that the State violated article IX, § 1. The remedy employed by the Court was significant. It chose not to retain jurisdiction over the case, *id*. at 538-39, and assumed the Legislature would do its constitutional duty:

> Although the mandatory duties of *Const. art. 9*, s 1 are imposed upon the State, the organization, administration, and operational details of the "general and uniform system" required by *Const. art. 9, s 2* are the province of the Legislature. In the latter area the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and, having acted, whether it has done

1 That provision of our Constitution states:

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

> so constitutionally. Within these parameters, then, the system devised is within the domain of the Legislature.
>
> While the judiciary has the duty to construe and interpret the word "education" by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that "education" within the broad guidelines. However, the broad guidelines which we have provided do not contemplate that the State must furnish "total education" in the sense of *all* knowledge or the offering of *all* programs, subjects, or services which are attractive but only tangentially related to the central thrust of our guidelines. Specifically, then, we shall refer to the Legislature's obligation as one to provide "basic education" through a basic program of education as distinguished from total "education" or all other "educational" programs, subjects, or services which might be offered.
>
> Respondents also suggest the need for additional judicial guidelines for matters less fundamental than those discussed heretofore. For example, they suggested we adopt guidelines concerning (1) deployment of instructional and classified staff; (2) staffing ratios and salaries; (3) individualization of instruction for the handicapped, gifted, below average, and for the particular unique needs of students; (4) recognition of unique demographical and geographical demands; (5) local control; and, (6) support services. However, in light of the judicial guidelines already set forth and considering the need for the Legislature to rethink and retool much of the present educational system, so that it may mesh as a working whole, we decline respondents' invitation. We are confident the Legislature will consider each of these concerns as well as all other appropriate matters when framing its definition of basic education and when giving substantive content to a basic program of education. There are important policy reasons, historical and otherwise, that pertain to these concerns. But, we cannot say at this time that any one of them, standing alone, rises to a constitutional imperative requiring immediate judicial intervention. While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature. *See Newman v. Schlarb*, 184 Wash. 147, 153, 50 P.2d 36 (1935).

Id. at 518-20 (emphasis in original). The Court also ordered that basic education as defined by the Legislature to be fully funded.

The decision prompted a sharp dissent by Justice Hugh Rosellini,

joined by two other justices:

> In *Aetna Life Ins. Co. v. Washington Life and Disability Ins. Guar. Ass'n*, 83 Wash.2d 523, 520 P.2d 162 (1974), this court unanimously declared that we are not a super legislature. The author of the majority opinion in this case was among the signers. Now it appears that this principle, which recognizes a constitutional limitation of the court's powers, will not be adhered to in cases where a majority of the court finds it expedient or desirable to substitute its judgment for that of the legislature upon a matter of public policy.
>
> Here the majority boldly usurps the legislative function, taking upon itself the right to decide what minimum education shall be provided the children of this state. It assumes the right to make this decision by virtue of a constitutional mandate. Assuming there is such a mandate, it is directed to the legislature and not to this court. The legislature being an autonomous branch of government answerable only to the people, it is for that body to determine how it will perform its constitutional duties.
>
> The majority, however, evidently assumes that this department of government is for some reason more conscientious than the legislature, more capable of understanding the public needs and desires, and equipped with the necessary wisdom, knowledge and discretion to justify an order to the legislature, directing its judgment with respect to the educational requirements and the allocation of the revenues of the state. It does so ignoring entirely the detailed and complex provisions of the school law contained in RCW Title 28A.
>
> The majority's action disturbs the legislature's constitutional power to decide what revenues shall be raised and how the funds in the public treasury shall be appropriated and allocated among the various offices, institutions, and services of the state.
>
> If this opinion is given credence, the court has substituted its will for that of the people, which can only be expressed through their elected representatives, and has seriously impaired the functioning of our constitutional form of government.
>
> I would be surprised to learn that the people of this state are willing to turn over to a tribunal against which they have little if any recourse, a matter of such grave concern to them and upon which they hold so many strong, though conflicting views. If their legislators pass laws with which they disagree or refuse to act when the people think they should, they can make their dissatisfaction known at the polls. They can write to their representatives or appear before them and let their protests be heard. The court, however, is not so easy

> to reach (See *In re Juvenile Director*, 87 Wash.2d 232, 552 P.2d 163 (1976)) nor is it so easy to persuade that its judgment ought to be revised. A legislature may be a hard horse to harness, but it is not quite the stubborn mule that a court can be. Most importantly, the court is not designed or equipped to make public policy decisions, as this case so forcibly demonstrates.

Id. at 562-64.[2]

Since the time of *Seattle School District*, the Court has rejected challenges to educational funding by the State, while reaffirming the core principles in that decision. *See, e.g., Seattle School District No. 1 of King County v. State*, 97 Wn.2d 534, 647 P.2d 25 (1982) (equally divided Court denied injunction restraining governor from issuing across-the-board expenditure reductions in K-12 education during 1981 fiscal crisis); *Ramsdell v. North River Sch. Dist. No. 200*, 104 Wn.2d 264, 704 P.2d 606 (1985) (Court reverses order permitting parents to remove children from school district that was allegedly constitutionally underfunded and to place them in more favorable district); *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2000) (rejecting application of art. IX, § 1 to incarcerated juveniles); *McGowan v. State*, 148 Wn.2d 278, 60 P.3d 67 (2002) (state obligated to fund cost-of-living increases for K-12 staff under Initiative 732); *Brown v. State*, 155 Wn.2d 254, 119 P.3d 341 (2005) (upholding legislative decision to fund 2 learning improvement days for teachers rather than 3); *Federal Way School Dist No. 210 v. State*, 167 Wn.2d 514, 219 P.3d 941 (2009) (rejecting constitutional challenge to salary funding formulae in Basic Education Act); *School Districts' Alliance for Adequate Funding for Special Education v. State*, 170 Wn.2d 599, 244 P.3d 1 (2010) (largely rejecting challenge to adequacy of special education funding).

In *McCleary*, however, the Court found that the State failed to meet its obligations under article IX, § 1, and determined to retain jurisdiction to monitor legislative compliance with the Court's mandate:

> This court cannot idly stand by as the legislature makes unfulfilled promises for reform. We therefore reject as a viable remedy the State's invitation for the court simply to defer to the legislature's

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2 As recounted in *McCleary*, 173 Wn.2d at 486-90, the Legislature enacted the Basic Education Act in 1977 and provided additional K-12 funds. When those funds were not as ample as some advocates wanted, a second round of litigation was commenced in the Thurston County Superior Court before Judge Robert Doran, who found the State's efforts wanting.

What was not reported in *McCleary*, however, is a fact about which I had first-hand experience as a State Senator and member of the Senate Ways and Means Committee. The 1983 Legislature provided a very large increase in K-12 funding in the 83-85 budget that caused the so-called Doran II decision to be moot.

> implementation of ESHB 2261. At the same time, we recognize that Plaintiffs' proposal to set an absolute deadline for compliance in the next year is unrealistic. The changes that have taken place during the pendency of this case illustrate that any firm deadline will, of necessity, be moved.
>
> A better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty. This option strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its article IX, section 1 duty, while also recognizing this court's constitutional obligation. This approach also has the benefit of fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms. The court below did not evaluate options for retaining jurisdiction, and the parties have not had an opportunity to address the issue. Our prior experience and the experience of other courts suggests there are numerous options, including retaining jurisdiction in the trial court, retaining jurisdiction in this court, or perhaps appointing a special master or oversight entity. While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1. Accordingly, we direct the parties to provide further briefing to this court addressing the preferred method for retaining jurisdiction.

173 Wn.2d at 545-46.

In words very reminiscent of Justice Rosellini, Chief Justice Madsen, joined by Justice Jim Johnson, dissented from the decision to retain jurisdiction, noting that the majority failed "to define the desired outcomes or to provide criteria or benchmarks against which a court, special master, or other entity can measure the legislature's compliance." *Id.* at 547-50.

Since the time of the Court's opinion briefs have been submitted to the Court on whether the State has made progress on funding,[3] prompting the Court to issue orders on July 18, 2012, December 20, 2012, and January 9, 2014. Justice James Johnson has dissented from the last two orders by separate opinion, reinforcing the points made by Justice Rosellini and Chief Justice Madsen.

As might be expected, such a vigorous and intrusive Court presence

3 Apparently such briefing is the basis for the interbranch "dialogue" suggested in the Court's opinion.

in legislative deliberations on K-12 organization and funding is not met with universal legislative approval. Some legislators introduced a constitutional amendment to reduce the Supreme Court's size. A recent January 17, 2014 letter signed by numerous House members rejected the basis for the Court's January 9, 2014 order.

The Court's Authority

The authority of the Supreme Court to declare whether the Washington Constitution has been violated is an inherent power of the judicial branch of our government. Since *Seattle School District*, there is little question that the Court has the authority to specifically address school funding under article IX, § 1.

The issue that is more profoundly troublesome, and presently impactful, is the nature of the remedy the Court can order. In the specific context of K-12 organization and funding, the remedy, chosen in *McCleary* and the subsequent orders of the Court, represents uncharted waters, particularly in light of the remedy employed by the Court in *Seattle School District.*

The Court has significant enforcement powers. There is little doubt that the Court has the power to enforce its orders through its inherent, and broad, contempt powers. *Moreman v. Butcher,* 126 Wn.2d 36, 42, 891 P.2d 725 (1995) ("Washington policy has long been that courts have the authority to coerce compliance with lawful court decisions and process by imposition of appropriate sanctions.").

In certain circumstances, the Court may even order the expenditure of funds without legislative appropriation. For example, in *In re Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976), the Court made clear that the judiciary has inherent authority to order expenditures necessary to sustain the core functions of the judiciary where the legislative branch failed to provide resources sufficient to allow the courts to perform their core constitutional duties. But in that case, the Court overturned a trial ord;er directing the expenditure of county funds for the salary of a judicial branch officer when the county commissioners failed to act. The Court established a high burden before such the extraordinary step of ordering expenditures of public monies without legislative appropriate could be taken:

> If separation of powers has as a basic element the preservation of the rule of law, court decisions must not be biased in favor of court funding. This admonition applies with equal vigor to the exercise of executive or legislative discretion in such a way that it appears to create a bias in favor of those branches, to the detriment of the judiciary.

> These considerations, as well as recognition that inherent power derives from the need to protect the functioning of an independent branch, have led courts to set a high standard for the application of inherent power in funding matters. The burden is on the court to show that the funds sought to be compelled are reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment of its constitutional duties. In addition, it is generally recognized, … that inherent power is to be exercised only when established methods fail or when an emergency arises.
>
> … it is incumbent upon courts, when they must use their inherent power to compel funding, to do so in a manner which clearly communicates and demonstrates to the public the grounds for the court's action. This can be accomplished by imposing on the judiciary the highest burden of proof in civil cases when courts seek to exercise their inherent power in the context of court finance. Lacking clear, cogent and convincing proof of a reasonable need for additional funds, it is unlikely the court would be willing to use its contempt power to enforce compliance with its fiscal determination. Thus, in circumstances where courts have been unable to build a convincing case, compliance with their financing orders has been problematic.

Id. at 249-51 (citations omitted). Before the Court could order the Legislature to actually expend specific dollars for K-12 education, the *Juvenile Director* burden must be met. Moreover, before the Legislature's decisions on the organization and funding of K-12 education could be overturned, the Court must determine that those statutory efforts failed to fund education "beyond a reasonable doubt." *Tinstall*, 141 Wn.2d at 220-23; *School Districts' Alliance for Adequate Funding of Special Education*, 170 Wn.2d at 605-08.

Conclusion

To a large extent, the issue presented here is not one of whether the Court has the power to take steps to order compliance with its *McCleary* opinion. It does. The more basic and nuanced question is whether it is wise to exercise that power.

When I was on the Court, I wrote a law review article entitled *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*. 22 Seattle U. Law Rev. 695 (1999). In that article I discussed the school funding cases in Washington and recounted the problems experienced by other state courts who became a part of the political process.

In reviewing the Court's post-*McCleary* orders, the Court has progressively articulated an ever more assertive role in defining basic education and its funding without defining the *specific* constitutional

requirements for either. Chief Justice Madsen's concurrence/dissent is apt. on that point. The Court has not articulated what basic education is,[4] against which to measure legislative compliance and funding.[5] This lack of precision means that the Court may not be making so much a constitutional decision, as a political, or normative, decision on how schools should be organized and how much K-12 funding is "adequate."

If the Legislature fails to meet the Court's rather amorphous mandate, what is the Court's "end game?" Will the Court find the Legislature or a distinct group of legislators in contempt? Justice Johnson's dissent on the January 9, 2014 Court order is quite pointed on this question. Dissent at 6.

Will the Court order the expenditure of funds for K-12 without legislative appropriation or go so far as to direct the raising of taxes to meet the expenditure level it deems adequate? Plainly, this would be a profoundly political act in an era when general tax increases are greeted with little enthusiasm and often face roll back initiatives.[6] In the absence of new revenues, if the Court simply redirected expenditures to K-12 schools, such a redirection must come at the expense of the two other significant components of the State budget--higher education or human services. Report of Joint Select Committee on Article IX Litigation at 22. The Court would hardly relish being the cause of distress to people in need or students in our universities and colleges.

Will the Legislature sit idly by and not engage in aggressive fiscal or constitutional steps in response to the Court's actions? Many of its members are restive and have offered what seem to be retributive measures. Other, troubling actions are possible, limited only by legislative imaginations. Apart

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4 This could require an inordinate Court role in programmatic decisions. Just as examples: What if the Legislature concluded that parents must deliver their children to school, and ended all school transportation funding? Is transportation constitutionally mandated? If the Legislature concluded headmasters were preferable to principals and eliminated funding for principals, are the services of principals constitutionally-mandated? To what extent are specific educational services constitutionally mandated?

5 My experience as a legislator was that no matter how much we provided for education, it was never enough for educational advocates. Budget requests from OSPI that were often based on advocates' wish lists for funding and usually had no real chance of legislative enactment.

6 There is a certain unintended irony in the fact that Initiative 732, with its automatic cost-of-living adjustments, is an issue in school funding. Most K-12 certified staff receive step increases annually for longevity.

Initiative 732 is extremely expensive. In 2000, the same year the voters enacted it, they also enacted Tim Eyman's Initiative 722, limiting property and other taxes, thereby removing millions of dollars from the State's general fund (the fund that pays for the cost of Initiative 732). The voters also enacted Initiative 728 that mandated various increases in education expenditures. Phillip Talmadge, *Initiative Process in Washington,* 24 Seattle U. L. Rev. 1017, 1021 (2001).

from reducing the size of the Supreme Court, the Legislature could choose not to fund certain judicial services. It could also consider a constitutional amendment to give the Legislature the exclusive authority to define the courts' jurisdiction or remedial authority.

None of this is pretty. The prospect of a major constitutional crisis between the legislative and judicial branch is something no one relishes.

While the Legislature certainly must heed the Court's construction of article IX, § 1 and clearly define basic education and fund it, the Court should respect the Legislature's exclusive constitutional role to organize K-12 education (article IX, § 2) and to tax appropriate funds (articles II § , VII, § 4).[7]

7 We should be exceedingly cautious about characterizing rights as "absolute" or "fundamental," lest we arrogate to the judiciary total responsibility for running Washington's education system. That is not what our constitutional framers intended. The judiciary cannot, and should not, "constitutionalize" education in Washington so as to place the administration and the funding of education beyond the responsibility of the executive and legislative branches to whom that responsibility was *expressly* entrusted by the framers. The courts are ill-equipped to annex such a duty from the other branches and to execute the considerable responsibilities associated with it.

Tinstall, 141 Wn.2d at 237 (Talmadge, J., concurring) (emphasis in original).

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